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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 20 2007

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as an aerospace researcher and consultant. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief. For the reasons discussed below, while we withdraw the director's implication that an alien must exceed the *qualifications* of aliens of exceptional ability to qualify for the national interest waiver, the petitioner has not overcome the director's other valid concerns. Specifically, the petitioner has not demonstrated that he has already influenced his field.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Aerospace Engineering from the University of Michigan. The petitioner's occupation falls within the pertinent regulatory definition of a profession. Thus, the director acknowledged that the petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

The director quoted the above language and then stated:

> However, the record does not establish that the petitioner's credentials exceed those of all aliens who seek to qualify as aliens of "exceptional ability," as that term is defined above, and that a waiver of the job offer requirement would be in the national interest.
>
> Again, Congress failed to define the concept of "national interest;" however, as indicated above, ". . . clearly an alien seeking to meet the (national interest) standard must make a showing significantly above that necessary to prove the 'prospective national benefit' (required of aliens seeking to qualify as 'exceptional.')." Given this, it would appear that an alien's qualifications must, in fact, lie somewhere between "exceptional" and "extraordinary" to qualify for the national interest waiver.

The director, however, ignores that the national interest waiver is available to both aliens of exceptional ability *and* advanced degree professionals. Significantly, *after* the publication of the final regulation at 8 C.F.R. § 204.5(k), which included the above-quoted commentary on which the director relied, Congress amended section 203(b)(2)(B) of the Act to extend the national interest waiver to advanced degree professionals.[1] Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232 § 302(a)(2)(D), 105 Stat. 1733, (Dec. 12, 1991). Extending the waiver to advanced degree professionals would be meaningless if they still had to qualify as aliens of exceptional ability.

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[1] While we acknowledge that the regulation at 8 C.F.R. § 204.5(k) has not been amended to include members of the professions holding advanced degrees as eligible for the national interest waiver, the statute supercedes our regulation.

We acknowledge that *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215, 216-217 (Comm. 1998), also quoted the above commentary. But it did *not* do so for the proposition that an advanced degree professional must demonstrate that his *credentials* exceed those of *all* aliens seeking classification as aliens of exceptional ability to secure a national interest waiver. Rather, the decision holds that the *benefit* of the alien's entry into the United States must exceed the *benefit* inherent in admitting aliens of exceptional ability. More specifically, the benefit for aliens of exceptional ability not seeking a national interest waiver is not necessarily national in scope for each alien. *See Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217, n.3.

Matter of New York State Dep't. of Transp., 22 I&N Dec. at 217-218, has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, fluid mechanics, and that the proposed benefits of his work, improved numerical computations and understanding of deep-water wave phenomena, would be national in scope.

While we concede that the proposed benefits of the petitioner's work would be national in scope, we note that the record does not support counsel's appellate assertions regarding the applications of the petitioner's work. Specifically, while counsel asserts on appeal that the petitioner's work has applications in preventing natural disasters by predicting tsunamis, only the petitioner himself made such a claim, and only in response to the director's request for additional evidence. The only references to practical applications of the petitioner's deep-water wave research in the witness letters are improved ship design to withstand severe storms. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980).

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. The director concluded that the petitioner had not demonstrated why the alien employment certification process would not

serve the national interest in this matter and concluded that the letters submitted do not establish the overall impact of the petitioner's work. On appeal, counsel asserts:

> Were [the petitioner] to be granted the requested waiver, his talents will remain available to the scientific community and the government of the United States. The operation of the labor market may or may not offer an opportunity at any particular time; if none is available now, [the petitioner] may leave the country. On the other hand, once public awareness of the necessity of tsunami prediction has developed into political will, the pool of qualified experts in this field will evaporate. One cannot speak of a labor market in the ordinary sense of the term, advanced scientific talent is not a fungible commodity. There is no market price for scientific talent that could save the country from natural disaster, if such talent is unavailable for recruitment.

Indeed, it is not clear from the record that the petitioner was still employed pursuant to a nonimmigrant visa as of the date of filing. Regardless, counsel appears to be asserting that the national interest waiver is a tool for securing a pool of presently unemployable aliens qualified to work in a field where the job market may, at some point in the future, create a need for their services. We find that such an analysis is far too speculative. It is the position of Citizenship and Immigration Services (CIS) to grant national interest waivers on a case-by-case basis, rather than to establish blanket waivers for entire fields of specialization, such as the sciences. *See Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217.

Counsel's sole support for the assertion that the United States is not taking the threat of tsunamis seriously is an article about how the United States is failing to monitor a volcano that, if it erupts, could send a portion of the volcano into the sea, causing massive tsunamis on the U.S. East Coast within three to four hours. The article expressly states that a warning once the volcano erupts would be too late. First, the record contains no evidence that the petitioner's work with fluid dynamics is relevant to monitoring the next eruption of a volcano. Second, as stated above, none of the petitioner's references assert that the petitioner's work is advancing existing methods for monitoring tsunamis. While the petitioner asserts, in response to the director's request for additional evidence, that a tsunami is a "breaking wave," he provides no support of that assertion. Notably, in the introduction to the petitioner's pending article, "A Numerical Study of Breaking Waves," the petitioner asserts that breaking wave research is important to understand the mixing processes that take place in the *upper layer* of the oceans and is "crucial for the safety of vessels and structures *at sea*." (Emphasis added.)

Even if the petitioner's work does have applications for tsunami research, it is not limited to tsunamis. Specifically, the petitioner's references attest to aerospace, biomedical, military (naval defense) and commercial applications of the petitioner's work. Thus, the record does not suggest that the petitioner's work is limited to a narrow field that has not been, but will be, recognized as nationally important.

Finally, even if we accepted that the alien employment certification process is somehow inapplicable or unavailable in the field of fluid dynamics, and we see no evidence to support such a conclusion, the

inapplicability of that process cannot be viewed as sufficient cause for a national interest waiver. Rather, the petitioner still must demonstrate that the self-employed alien will serve the national interest to a substantially greater degree than do others in the same field. *Id.* at 218, n. 5.

For all of the above reasons, counsel's assertion that the petitioner's purported expertise in tsunami warning systems may someday make him valuable to the national interest is not persuasive.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state, as counsel does on appeal, that the alien possesses useful or "unique" skills. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As stated above, the petitioner received his Ph.D. in Aerospace Engineering from the University of Michigan on December 16, 2001. The petitioner then worked as a postdoctoral research fellow at the same institution through November 30, 2003. In his personal affidavit accompanying the petition, signed March 1, 2004, the petitioner does not discuss any subsequent employment. The petitioner asserts that his petition is supported by reference letters, his unpublished Ph.D. thesis, and three articles in various stages of preparation for publication. Thus, as of the date of filing, none of the petitioner's work had been published and, thus, widely disseminated in the field.

In his affidavit, the petitioner asserts that he performed his Ph.D. research under the supervision of Dr. [redacted], an associate professor at the University of Michigan, and Dr. [redacted] a former professor at the University of Michigan who is currently Head of the Mechanical Engineering Department at Worcester Polytechnic Institute. Dr. [redacted] asserts that the petitioner's research, funded by the National Aeronautics and Space Agency (NASA), focused on microgravity. The petitioner developed new computational methodology to study fluid atomization, designed a system that can be operated in zero gravity as well as on Earth and demonstrated a correlation between numerical results and experiments for liquid column/jet systems. Dr. [redacted] asserts that scientists and researchers "around the globe recognize and acknowledge the significance, impact, and contributions [the] petitioner has made to the field." Dr. [redacted], however, provides no examples of other laboratories,

whether governmental, academic or commercial, applying the petitioner's work. As stated above, the record contains no evidence that the petitioner had presented or published this work as of the date of filing.

Dr. [redacted] explains that the petitioner's Ph.D. research focused particularly on how one drop of fluid inside another is formed. Dr. [redacted] assisted the petitioner with the computational aspects. The petitioner was "able to identify several different regimes of drop formation, how they depended on the numerical parameters, and what the underlying mechanisms are." Dr. [redacted] concludes that this work is important, has been visited by other researchers and covered parameter ranges that are not conducive to experimentation. Dr. [redacted] does not explain how this work had already impacted the field.

After obtaining his Ph.D., the petitioner worked in the laboratory of Dr. [redacted], an assistant professor at the University of Michigan. During this time, the petitioner focused on numerical simulation of polymer flows and breaking waves. This work was funded by the Defense Advanced Research Projects Agency (DARPA) and the Office of Naval Research (ONR). Dr. [redacted] asserts that this work led to a conference paper and a paper currently under review for publication but does not identify specific results or explain how the petitioner's results are significant and influential.

The petitioner then joined the laboratory of Dr. [redacted] an assistant professor at the University of Michigan. There, the petitioner investigated wave breaking "on the ocean surface." Neither Dr. [redacted] the petitioner nor any other reference assert that surface wave breaking research is applicable to tsunamis, which, according to the article submitted on appeal, travel below the surface. Dr. [redacted]i explains that the project is important because the "understanding of mixing processes inducted by large amplitude internal wave breaking is far way from complete, and such a nonlinear process has to be correctly modeled for a better prediction of ocean circulation and therefore climate." Dr. [redacted] speculates that this work "will be of value," but does not identify any significant results already obtained by the petitioner.

Finally, [redacted]l, Professor Emeritus at University of Michigan, reiterates the assertions made by the other references. He concludes that the petitioner's Ph.D. thesis is very important, but provides no examples of its influence in the field. He further concludes that the petitioner's wave breaking research "can have important practical applications, as for example in the improvement in the design of ships to withstand severe storms."

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.*

at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we note that letters containing mere assertions of government or commercial interest and positive response in the field are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive letters. The petitioner did not submit any letters from professionals beyond his immediate circle of collaborators at the University of Michigan.

While the petitioner's research may have been funded by NASA, DARPA and ONR, most research is funded and, thus, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

Without letters from independent researchers influenced by the petitioner or evidence that the petitioner's work has been published and cited or covered in the media, we cannot conclude that the petitioner has a track record of success with any influence on the field. Not only has the petitioner failed to provide evidence that he has been cited, he had yet to even publish his work as of the date of filing.

While the petitioner's research is no doubt of value, it can be argued that any research must be shown to be original and present some benefit if it is to receive funding and attention from the scientific community. Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.